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ABSTRACT

Two areas of law are examined in this paper: student free speech and immorality as the basis of teacher dismissal. These areas are discussed to exemplify an increasing impact of judicial decisions on school practices, and to support the argument that schools of education need to engage in teaching and research about law as it relates to education, including school policies and practices. The first of the two doctrines considered, the Tinker standard of "material and substantial interference with the requirements of appropriate school discipline," leads to suggestions of how a decision might be reached that would arfect the school's curriculum if educational theory and research were properly applied to legal theories. The second doctrine, the Morrison "fitness to teach" test, is used to point out the need for certain evidence before just and consistent results can be reached. Discussion of both doctrines suggests ways of increasing the potential for pluralism in curriculum and staffing patterns. (Author/KSM)

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EDUCATIONAL THEORY GOES TO COURT:

FREEDOM OF SPEECH AND FITNESS TO TEACH

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EDUCATIONAL THEORY GOES TO COURT: FREEDOM OF SPEECH AND FITNESS TO TEACH

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(Third Concurrent Session)

Increasingly judicial decisions are impacting on school practices. Thus, the need is greater for practitioners to gain knowledge of and skill with legal materials. This is sufficient reason for schools of education to engage in teaching and research about law as it relates to education. There is another reason why educators, especially philosophers, should engage in a study of law, namely, they can discover topics for research and theory development from a study of judicial decisions--topics which when combined with legal arguments and theory could, through planned use of the courts, result in changes in school policies and practices. This is not a particularly novel suggestion, as evidenced by recent cases dealing with school finance, where such a program is underway. Nevertheless, the point needs stressing. In a number of areas of law, two of which are examined in this paper--student free speech and immorality as a basis of teacher dismissal--inadequate judgments have been rendered. Often the inadequacy is the result of a lack of theory and research concerning the problems raised in the courts. To parody Kant's famous dictum, educational theory without legal principles is often impotent and, more importantly, legal principles without educational theory can be blind. A stark example of this problem is the court's statement in Andrews v. Drew:

00003

> During our evidentiary hearing, educational and psychological experts have presented differing views, mainly of a judgmental nature unsupported by any studies that provide a solid factual basis for their conclusions. These professional opinions, when simplified, rest either on the notion that an unwed parent is not likely to be a proper example for students, or, on the contrary view, that such parentage has absolutely no relationship to the function and role of teachers or other employees in a public school system.[1]

Another example is Goss v. Lopez, the recent student due process case, in which a right is granted as a result of a standard due process analysis.[2] However, in practice there is no guarantee that it will make any difference. The dissents' objections to the holding for the most part seem to assume that education in this country still takes place in one-room schools. Arguably, a court more informed about educational practice and policies could reach a better decision.

In this paper two doctrines are examined--the Tinker[3] standard of "material and substantial interference with the requirements of appropriate school discipline" and the Morrison[4] "fitness to teach" test. With respect to the former we shall suggest how a decision might be reached that would affect the school's curriculum if educational theory and research were properly applied to legal theories. With respect to the latter, we shall point out the need for certain evidence before just and consistent results can be reached. Both arguments suggest ways of increasing the potential for pluralism in curriculum and staffing patterns.

Tinker Revisited

In December, 1965, Mary Beth Tinker and other students wore black armbands to school in support of a Vietnam truce during the holiday season. Based on a recently adopted regulation by the principals of the Des Moines Schools, the

students were suspended from school when they refused to remove their armbands.

The United States Supreme Court reversed the lower court's decision, which had dismissed Tinker's complaint, pointing out that "First Amendment rights, applied in the light of the special characteristics of the school environment, are available to teachers and students." Schools, according to the majority, may not be enclaves of totalitarianism; students "may not be confined to the expression of those sentiments that are officially approved." The court concluded that school officials cannot limit a student's expression of his opinions, even on controversial subjects, unless the school can show that the "forbidden" speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Since personal intercommunication among students is both an inevitable part of the process of attending school and an important part of the educational process, "appropriate discipline" does not allow limiting expression of students' opinions to topics approved by the school officials or to supervised and ordained discussion in a school classroom.

Black's dissent is essentially an expression of judicial restraint, i.e., elected school officials, not courts, should determine what regulations are necessary to control pupils. However, in support of his position he rejects the majority's view of the nature of schooling--"taxpayers send children to school on the premise that at their age they need to learn, not teach."

Expressions which divert students' minds from their regular lessons are subject to school officials' regulations. Thus, to a large extent, Fortas' majority opinion can be distinguished from Black's dissent on the basis of their differing views as to the nature of education. This is another illustration of the problem posed in the paper. Although Black's general position

that the lack of competence of school children is a basis for not including them within the scope of freedom of speech should be rejected, his opinion is suggestive of some proper limitation upon freedom of speech in schools. Briefly, let us make two suggestions, both of which are arguably unworkable. They could also open the door for abusive practices by principals. Our suggestions are that (1) it be made clear that freedom of speech just applies to the expression of beliefs that are essentially political and (2) topics, such as the promotion of racial superiority, which are clearly against public policy should be restricted. The former is intended to preclude verbal attacks upon teachers, such as "you don't know the right way of teaching math." The latter is not intended to preclude minority political or policy beliefs.[5] It might also have the effect of correcting the problem in Guzick discussed below. Matters such as these can adequately be decided only by a court which is informed about educational theory and practice.

Two things are not factors in Tinker, namely, (1) whether or not the student by his expression intended to disrupt, and (2) whether or not the school could reasonably control the disruption that flowed from the student's expression. Thus, on the Tinker test, a student's expression of political belief can be curtailed even though it evidences no intention to disrupt. Under such circumstances the school is not under any obligation to adopt measures to protect the student's right of expression in the face of potential disruption by providing measures to prevent disruption or by seeking to control actual disruption before limiting the student's expression.

A consideration of Guzick v. Drebus[6] will point out a further problem with the Tinker standard that free speech cannot be denied without a showing by the school that the expression will materially and substantially disrupt the work and discipline of the school. Guzick was, in our view, incorrectly

decided, but this is not the troublesome point the case raises. The point is that it shows that freedom of speech can be rather easily restricted in racially mixed inner-city schools. Thus, we have a situation in which the same type of expression can be prohibited in certain types of schools, but cannot be in others.

A brief examination of Guzick will demonstrate this point. Thomas Guzick was suspended from school for refusing to remove a button which solicited participation in an anti-war demonstration. Although the Court of Appeals said the facts bring the case within the scope of Tinker, it upheld the suspension even though, as the dissent points out, there was no indication that the wearing of the particular button would disrupt the work and discipline of the school. The court upholds the suspension by distinguishing the Guzick facts from the Tinker facts on essentially two grounds: (1) the rule applied to Guzick, forbidding the wearing of all symbols whereby the wearer identified himself as a supporter of a cause or bearing messages unrelated to their education, was a long standing one, and (2) the current student population at the school is 70% black and 30% white and there were occasions when the wearing of buttons with racially inflammatory messages--in violation of the regulation--lead to disruptions. Neither of these factual distinctions justifies the result reached in Guzick. In Tinker the fact that the arbitrary school rule was directed at the particular example of expression, the armband, is not an essential factor in the decision. The second distinction distorts Tinker, since Tinker requires a showing that the particular student's activities would materially and substantially disrupt the work and discipline of the school. The District Judge concluded from the evidence presented by educators that the abrogation of the school's rule would inevitably result in collisions and disruptions that would seriously subvert the school as a place of education,

00007

even though he did not find the message of the button in question inflammatory, per se: "Although there was evidence that the message conveyed in this particular button might be such as to inflame some of the students at Shaw High, the Court does not feel that such a result is likely."[7]

The principle problem with the Tinker rule is not the danger--as in Guzick--of its misapplication. It is rather that it fails to take sufficient account of (1) the central purpose of the freedom of speech clause, namely, to protect the expression of minority positions from governmental restrictions; (2) the fact that disruption is an inappropriate response to expressions of belief: it is at odds with the notion of a school as a market place of ideas; and (3) the view that schools have a duty--more so than any other public institution--to teach the young the meaning of freedom of speech. It could be argued that this duty includes not only learning that disruption is not a permissible response to minority expression, but also learning to refrain from such disruption in the face of "objectionable" views.[8]

As a result of failing to take account of the above, the Tinker rule justifies the suspension of students, irrespective of their intentions, when the school meets its burden on the question of disruption. In effect, it permits inappropriate responses to expressions of belief by other students, and possibly by teachers, to override particular student's rights.

Clearly schools cannot properly function in the midst of disruptions, but from this fact it does not follow that an appropriate response by courts is to merely uphold the student's suspension when school officials meet their burden under Tinker. Other or further responses are more consistent with the above mentioned principles. At least a showing by the school that it cannot reasonably control the disruption should be required. The only school case we know of that places a burden on schools to show that they could not,

by taking reasonable steps, control the disruptive response to expression is Crews v. Clones.[9] This case involved a student whose hair length violated a school regulation. The court held that hair length was within the scope of freedom of speech, found the evidence insufficient to justify suspension on the Tinker "disruption" test, and adopted Professor Chafee's view that it is absurd to punish a person "because his neighbors have no self control and cannot refrain from violence."[10] This is not to say that schools should be required to use means required in society at large to prevent or stop disruption: "because of its relation to the achievement of education goals, the states interest in maintaining order may be greater in the school contest than in society in general."[11] Schools should not be required to call out the police to protect the expression of beliefs by students.

Requiring the schools to show that it cannot control, perhaps by punishing disruptors, inappropriate responses to expressions of speech is different from Tinker in an important way: namely, it places on the schools an <u>affirmative duty</u> to protect students' rights. Tinker, on its face, merely establishes the right of students to express their beliefs without restrictions based upon unsupported views of schoolmen.[12]

The importance of Crews is its suggestion, which is implicated in Tinker, that given students' right of freedom of speech, schools have an affirmative duty to protect this right. It is not our purpose here to examine the proper scope of this duty. Rather, it is to suggest a line of argument leading to a result in the form of a court order that would effectuate what we, at least, regard as an important curriculum change in schools: a change that would counteract schools' tendencies to exclude from the curriculum matters that are regarded as both important and controversial in a given community.[13]

00009

Arguments, not entertained here, concerning topics such as the proper scope of the school's duty to protect students' free speech rights, the ability of the schools to effectively teach the meaning of constitutional rights, and the causal role school policies and practices play in bringing about disruption in the face of expression of unpopular beliefs, would be helpful to a court in deciding the appropriateness of an order of the sort we are proposing. In short, our proposal is that when a school demonstrates that there is a material and substantial likelihood of disruption resulting from students' expressions and that it cannot control the disruption, the court should uphold the suspension of the student who refuses to cease his expression. But it should further order that the school take corrective steps, i.e., to teach the meaning of free speech in an effective way, including appropriate responses to it; appoint a panel to supervise and evaluate the schools' efforts; and require that after a set period of time the school demonstrate the success of its efforts by allowing student expressions of speech previously restricted. In short, a school acts at its peril in restricting freedom of speech.

Although courts, on constitutional grounds have prohibited certain curricular practices[14] and have required significant changes in education policies that have directly affected curriculum,[15] they have not, as some would say, intruded on curricular determination to the extent we are suggesting.

Nevertheless, there are legal doctrines supportive of the result we are suggesting. The result could be reached just from the fact that freedom of speech is a protected right for school children and the fact that schools by statute have a duty to teach constitutional principles. Schools are different from the public arena at large primarily because of the age of students. Immaturity of students and special requirements of discipline are often cited

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as reasons for requiring less reason to restrict protected rights. But this difference could be viewed from a different perspective, namely, children have a special need to learn the meaning of protected rights and schools have a duty to teach them; whereas the public arena at large is just a place where rights are to be protected.

Disruptive responses to speech should be prohibited generally, but in schools such responses are particularly inappropriate. Even though school practices and policies might not play a causal role in the disruption; nevertheless, the disruptions suggest the school's failure to do what it is obligated to do by statute. To the extent a court were pursuaded that teaching students to respond by discussion, not disruption, to expressions of belief was within the scope to the school's duty to teach the meaning of freedom of speech, it might grant the order we are suggesting. Lau v. Nichols[16] reaches a similar result, relying on the Civil Rights Act of 1964.[17] Viewing English skill as being "at the very core of what these public schools teach," the U.S. Supreme Court decided that even though the school is not responsible for the fact that non-English speaking Chinese students cannot benefit from the same instruction to the extent that other students can, they ruled that schools have a duty "to rectify the language deficiency in order to open the institution to students who have 'linguistic deficiencies'." In this sense, the Lau remedy is similar to the remedy we are proposing here.

Although it is not so generally recognized, freedom of speech, like English, is at the core of American education. Further, unlike English, it is at the very core of the constitution. If courts are willing to make a remedial order with respect to the teaching of English, then a fortiori, they ought to be prepared to make a similar remedial order with respect to the teaching of freedom of speech.

Cases in which courts have overturned school policies or practices have an important element in common: namely, the practice or policy had the effect of restricting the exercise of a protected right. To the extent that it can be shown that school structures, policies, practices or personnel[18] are causal factors in students' disruptive responses, our argument is strengthened. The point is not that one should seek to show that schools are the proximate cause of disruption; rather, it is to show that schools by their practices or policies (by the hidden curriculum if you will) teach students not to respect expressions of unpopular views. Arguably, a school's suspension of students for expressions of belief itself teaches that disruption is a permissible response to expressions of unpopular views. A showing of this de jure element is no doubt necessary to reach our result, just as it is necessary in segregation cases.[19]

There is one further argument, namely, equal protection. On the Tinker standard, as Guzick suggests, whether or not a student's expressions of belief will be allowed is a function of the type of school he attends. On the traditional standard of review of classifications this difference would not violate the equal protection clause. The need for order in schools has a rational relationship to a legitimate state purpose. However, here the classification is suspect, since it touches on a fundamental interest--freedom of speech--and at least in Guzick, the classification in effect is based on race. It is well established that to prevail when the classification is suspect, the state must establish not only that it has a compelling interest which justifies the classification, but also that the classification is necessary to further the state's purpose. The equal protection argument does two things: (1) increases the likelihood that a court will strictly scrutinize school policies to determine if they have a detrimental effect on

00012

a protected right, and (2) increases the likelihood that a court will reject anything short of compelling evidence of the school's inability to effectively teach the meaning of freedom of speech.

Although our proposal may be viewed by some as an impermissible exercise of judicial authority and as an impossible task for schools, in fact all it suggests is that schools take seriously a duty that they presently have; hopefully before a court requires them to do so.

Fitness to Teach

Recently in a number of cases involving dismissal of teachers or revocation of certification, courts have narrowly construed the statutory language--"immoral," "conduct unbecoming a teacher," or "moral turpitude"--requiring a school board to demonstrate that there is a nexus between the alleged immoral conduct and fitness to teach before such conduct comes within the scope of these statutory terms. This construction is in sharp contrast to a number of earlier cases which broadly construed such terms in upholding the dismissal of teachers. For example, in Gover v. Stovall[20] the court held that the board of education did not err in dismissing a teacher for secretly being in the school without lights between 8 and 9 p.m. with another male and three females even though there was no evidence that any immoral act was perpetuated or attempted. The court said, "...when he engages in conduct that in the minds of a prudent and cautious person would arouse suspicions of immorality, he is then guilty of such conduct as is contemplated by the statute."

The fitness to teach doctrine gives greater protection to a teacher's private conduct than does the Grover approach--"where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own business and may not be the basis of discipline."[21] Further, the fitness to teach doctrine does save immorality statutes, at

least on their face, from being constitutionally void for vagueness in violation of due process.[22]

An examination of the factors suggested in Morrison v. State Board of Education,[23] the leading case, to be taken into account when seeking to determine if the conduct indicates an unfitness to teach and of some post Morrison decisions will reveal that the protection under the doctrine could turn out to be illusory. The development of theory and data with respect to these factors is necessary to reach just and consistent results under the fitness to teach doctrine. Such theory and data would also help settle a question that is at present unresolved, namely what should the impact of the existence of a constitutional right be on the determination of fitness to teach.

In Morrison, the teacher privately engaged, for a one week period, in a limited, non-criminal physical relationship which he described as being homosexual in nature. Three years later, the State Board of Education revoked Morrison's life diplomas; because it concluded his action constituted immoral and unprofessional conduct. With the exception of this single incident there was no suggestion of Morrison's ill-performance as a teacher or of any reproachable conduct outside the classroom.

The court held that Morrison's certificate could be revoked only if his conduct indicates an unfitness to teach, largely because of vagueness problems with "immorality" and because an employee's private conduct is a proper concern of the state only to the extent it affects his job performance. "An individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be offended by his actions as a teacher."[24]

This test seemingly provides adequate protection for teachers from arbitrary dismissal, especially if "significant" is stressed. However, Pettet v. Board of Education,[25] a post-Morrison case, indicates that teachers can be dismissed for conduct that under this test does not indicate an unfitness to teach. In Pettet, the court upheld revocation and dismissal of a teacher who engaged in a swinger's party and who disguised, but recognized by another teacher, appeared on two televised discussions of unconventional sexual lifestyles about which she spoke approvingly. There was no evidence that knowledge on the part of a few teachers and administrators of Pettet's televised comments in any way interferred with her teaching effectiveness or her relationships with colleagues, or that knowledge of her conduct had come to the attention of parents or students. "Notoriety" was regarded by the court as conclusive.

Cases overturning board dismissals of teachers on a fitness to teach standard typically involve single non-criminal acts of "misconduct" involving no threat of harm to students. The revocation of Richard Erb's[26] teaching certificate on the grounds of moral turpitude was held to be illegal. Erb had a brief affair which was discovered by the woman's husband hiding in the trunk of a car while Erb and his wife had sexual intercourse in the back seat. Erb was forgiven by his wife and the student body, and he maintained the respect of the community. All witnesses, except the husband and two others, vouched for Erb's character and fitness to teach. There was no evidence Erb's conduct was likely to recur; nor was it an open or public affront to community morals. In Oakland Unified School District v. Olicker[27] the teacher, who in class had discussed papers written by her students that contained "vulgar references to the male and female sexual organs and the sexual act," was dismissed. The court overturned the dismissal inasmuch as

a month went by uneventfully after the class discussion giving evidence that her fitness to teach had not been appreciably impaired by her admitted indiscretion.

To a large extent, the Morrison decision is responsible for the lack of clarity and, thus, inconsistency in the application of the fitness to teach doctrine. It suggests a number of notions many of which are vague, a board of education may consider in determining whether the teacher's conduct indicates unfitness to teach without giving any guidance as to how these factors are to be ranked or balanced. Some of the factors are: (a) the likelihood the conduct may have an adverse affect on students or fellow teachers, (b) the praiseworthiness or blameworthiness of the motives resulting in the conduct, (c) the likelihood of the recurrence of the questionable conduct, and (d) the notoriety of the conduct to the extent that it impairs the teacher's ability to command respect and confidence of the students and fellow teachers.

No argument is necessary (1) to show that some of these factors have at best a remote relationship to one's fitness to teach; (2) to show that a pattern of continuous questionable behavior, such as living together without being married, is more likely to indicate an unfitness to teach, in a loose sense, than are single acts; or (3) to show that general beliefs, usually unsupportable, concerning negative effects that "immoral" teachers have on student behavior and values will be the basis for dismissing teachers. One commentator argues that a proper application of the Morrison test would result in dismissal only on two grounds: the potential for misconduct with students and the destructive effect of notoriety on the teaching environment.[28]

The point is, without substantial research concerning the actual or potential harm to students and the school community that will result because

of "immoral" conduct or publicity surrounding it, it is likely that the fitness to teach doctrine will justify varying results and will uphold the dismissal of teachers whose conduct poses no significant danger of harm or does not substantially impair their function as a teacher even if the nature of the conduct is generally known. To the extent that such results occur, schools will continue to be institutions in which those whose conduct is controversial will have no place.

A factor, not listed above, that Morrison cites as relevant in a determination of the fitness to teach question is, "the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved."[29] This is not a factor in the cases discussed above; however it increases the need for research especially on the question--to what extent does a known act or state that is arguably immorality on the part of a teacher effect the values, beliefs, or conduct of students?

The areas in which the effect of a protected right in determining fitness to teach is likely to be tested are cases involving unmarried pregnant teachers or teachers who are unwed mothers. There are three decided cases involving these questions. In Reinhardt,[30] a teacher was unmarried and obviously pregnant at a time during which she taught, but shortly thereafter she married. After finding no evidence to support the view that "her condition and unmarried status became a matter of public knowledge and discussion to the detriment of her relationships with fellow teachers, parents of pupils and other citizens and residents of the school district," the court reinstated her on a sex discrimination theory. In Drake,[31] the superintendent discovered from Drake's doctor that she was pregnant and visited him to discuss the possibility of an abortion. The court held "in the absence of any

compelling interest, to base cancellation of Drake's employment contract on evidence growing out of her consultation with her physician was...an unconstitutional invasion of her right of privacy." There was no evidence that Drake's claimed immorality had affected her competency or fitness as a teacher. In Drew,[32] two black females were wrongfully denied employment as teacher's aids because of a local policy which forbade employment of school personnel who are unwed parents. The denial of employment was wrongful because "one's previously having had an illegitimate child has no rational relation to the objectives [the need for proper teacher models and the need not to contribute to the problem of school-girl pregnancies] ostensibly sought to be achieved by the school officials and is fraught with invidious discrimination...alternatively, the policy...constitutes an impermissible, discriminatory classification based on sex."

These cases are not decisive on the question of the effect of a protected right on the determination of fitness to teach. Nevertheless, they are important because they hold that unmarried pregnant teachers and unwed mothers are within the scope of sex discrimination and/or privacy and thus suggest that a compelling state interest test is applicable. This raises the question, "What would count as evidence of unfitness to teach, such that a showing of unfitness would be sufficient to meet the burden of compelling state interest?" The case that would require a court to deal specifically with the relationship (proper balance) between a protected right and fitness to teach would be an unmarried pregnant teacher seeking treatment undifferentiated from a married pregnant teacher. The case probably would turn on the question of non-physical harm to students resulting from the teacher's status--the extent to which a teacher is a model that affects student behavior and belief--and possibly on the effect of notoriety on the teacher's

effectiveness. Since a protected right is involved, the school would have an increased burden to prove the harm. Again, the problem is that evidence that would increase the likelihood of a just result is not available. To the extent that this fact continues to be true, decisions are going to be rendered on strictly legal grounds, and at times on unsupported beliefs, without the aid of important and supported policy considerations.

In this paper we have discussed areas of law that are important to schooling and which have the potential, given the necessary research, theory and data, to change school curriculum and staffing patterns. There are other areas of school practices being tested and challenged in the courts, e.g., issues involving parents' and students' rights, as well as potential conflicts between them, that cannot be appropriately settled without theory and research about school practices and needs. A study of law is suggestive for possible areas of research and theory development, and for discovering ways of using it to impact on the practice of education.

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[1]Andrews v. Drew, U.S. District Court (Northern District, Mississippi) No. CC 73-20-K (1973).

[2]Cross et al. v. Lopez et al. Supreme Court of the United States, No. 73-898 (Jan. 22, 1975).

[3]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

[4]Morrison v. State Board of Education, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d375 (1969).

[5]Smith v. St. Tammany Parish School Board, 316 F. Supp. 1174 (E.D. La. 1970), aff'd, 448 F. 2d 414 (5th Cir. 1971)--recently integrated school required to remove Confederate flags--and Cook v. Hudson, 365 F. Supp. 855

(N.D. Miss. 1973)--school rule prohibiting teachers from enrolling their children in racially discriminatory private schools does not violate the teacher's First Amendment rights--provide support for our second suggestion.

[6]Guzick v. Drebus, 431 F. 2d 594 (6th Cir. 1970).

[7]431 F.2d at 597 n.1 emphasis added. The court considered the application of the least restrictive alternative rule, the effect of which would be to allow political, but not racial messages, but rejected it because it would create for the school officials an unbearable burden of selection and enforcement. This is good law in some situations, but arguably not here because the contested school rule also places the burden on school officials because it allows buttons displaying messages related to education.

[8]The existence of this duty and especially its extent is not clear. Argument is needed in its support. State statutes, e.g., New York's section 3204 (3) (a) (2) "The course of study...beyond the first eight years...shall provide for instruction in at least...and American history including the principles of government proclaimed in the Declaration of Independence and established by the Constitution of the United States," support the argument.

[9]Crews v. Clones, 432 F. 2d 1259 (7th Cir. 1970).

[10]Chafee, Free Speech in the United States, pp. 151-52 (1941).

[11]432 F. 2d at 1265.

[12]In fact in Crews, the additional burden placed on the school made little difference, for the disruption, if it existed at all, was relatively unsubstantial--students peered in class windows to see if Crews was present and his presence caused "strained" relationships between the biology teacher and the students. According to the court, such evidence did not meet the Tinker test.

[13]See Thomas F. Green, Education and Pluralism: Ideal and Reality, The J. Richard Street Lecture, School of Education, Syracuse University,

(1966) p. 31, for a discussion of what Green refers to as the principle of concern. "...if the topic is one about which people care very deeply, and if they are divided in their deeply held opinions, then to that extent, it cannot be introduced into public education."

[14]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); Abington School District v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963); and Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968).

[15]Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); Robinson v. Cahill, 62 N.J. 473, 303 A. 2d 273 (1973); Hobson v. Hansen, 269 F. Supp. 401 (1967), and Mills v. Board of Education 348 F. Supp. 866 (1972).

[16]94 S. Ct. 786 (1974).

[17]42 U.S.C. § 2000d.

[18]See Michael G. Kirsch, "Are Secondary School Principals Ignoring Tinker?" Phi Delta Kappan, December 1974, for a summary of a study which suggests many principals are unaware of recent court decisions and some who are aware of them fail to comply with them.

[19]Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). See especially Justice Powell's decision.

[20]Cover v. Stovall, 272 Ky. 172, 35 S.W. 2d 24 (1931).

[21]Jarvella v. Willoughby-Eastlake City School District, 12 Ohio Misc. 288, 233 N.E. 2d 143 (1967).

[22]An argument could be made that "fitness to teach," like "immoral" is not sufficiently clear as to give a fair warning of the conduct prohibited. In Morrison v. State Board of Education 461 P. 2d 375 at 389 (1969) the court says that the fitness to teach construction gives the statute the

required specificity, in part, because, "Teachers, in light of their professional expertise will normally be able to determine what kind of conduct indicates an unfitness to teach." To the extent that one can show that the truth of this proposition is necessary to save the statute and that it is false (as it no doubt is) one raises a vagueness problem. In Burton v. Cascade School District Union High School No. 5 353 F. Supp. 254 (1973) the court holds that an immorality statute is unconstitutionally vague, saying "no amount of statutory construction can overcome the deficiencies of this statute."

[23]Morrison v. State Board of Education, 461 P. 2d 375 (1969).

[24]461 P. 2d at 391.

[25]Pettet v. State Board of Education, 10 Cal. 3d 29, 513 P. 2d 889 (1973).

[26]Erb v. Iowa State Board of Public Instruction, Supreme Court of Iowa, No. 55838 (Mar. 27, 1974).

[27]Oakland Unified School District v. Olicker, 25 C. A. 3d 1098 (1972).

[28]Robert E. Willett, "Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct," 61 Cal. Law Review 1442.

[29]461 P. 2d at 386.

[30]Reinhardt v. Board of Education of Alton Community Unit School District No. 12, Circuit Court 3rd Judicial District, Madison County, Illinois, No. 72Z75 (Jan. 23, 1973).

[31]Drake v. Covington Board of Education, U.S. District Court, Middle District of Alabama, Civil Action No. 4144-N (Jan. 22, 1974).

[32]Andrews v. Drew Municipal Separate School District, U.S. District Court, Northern District of Mississippi, No. GC 73-20-K (July 3, 1973).